Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

CITY & COUNTY OF SAN FRANCISCO
A Municipal Corporation,
Plaintiff and Respondent,
v.
BURT HAMROL
Defendant and Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's holding in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), — the "just compensation" clause of the Fifth Amendment requires that an exaction imposed as a condition of project approval be roughly proportional to the impact the project will cause, with the governing body bearing the burden of proof — applies to all regulatory exactions; or is the holding limited solely to exactions of interests in land?

2. Whether a city can establish that an exaction substantially advances a legitimate public interest directly related to the project approval — as required by this Court's opinion in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) — by reference to legislative findings in the levying enactment, notwithstanding proof at trial that no such advancement exists on the facts of this specific case?

3. Whether the action of the City and County of San Francisco ("City") constitutes a "taking" under the Fifth and Fourteenth Amendments of the United States Constitution when the City has sought to impose a regulatory fee to alleviate a project's burden on transit when City has admitted that (i) the project in question will impose no burden on transit, and (ii) justifies the fee on the grounds that the property owner had the burden to prove the opposite, i.e., to prove that the project would not burden transit at some time within its forty-five year useful life?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeal of the State of California.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, BURT HAMROL, an individual ("Hamrol"), petitions for a Writ of Certiorari to review the order of the California Court of Appeal, First Appellate District, Division Four. The California Supreme Court denied Hamrol's request for review. Hamrol has no further appeals within the California state court system.

NOTE: In all quoted material, footnotes are omitted and emphasis is ours unless otherwise stated. We support factual statements by citation to the record before the California Court of Appeal. We use "RT" for citations to the Reporter's Transcript and "AA" for citations to Appellant's Appendix (containing documents filed with the Court Clerk) by document and page reference where appropriate. We refer to trial exhibits by exhibit number.

OPINION BELOW

The opinion of the Court of Appeal was filed on September 29, 1994. A copy of the opinion is attached as Appendix A.[1]

JURISDICTION

The California Supreme Court's denial of Hamrol's Petition for Review constitutes the final decision of California's highest court in this matter.[2] This Court has jurisdiction under 28 U.S.C. Sec. 1257(a).[3]

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution: "[N]or shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> SECTION 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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[1] The Court ordered that the opinion not be published in the official reports. See Appendix A, Page 1; Rule 976(c)(1), Calif. Rules of Court.

[2] The order of the California Supreme Court denying Hamrol's Petition For Review was filed on December 14, 1994. A copy of the Supreme Court's order is attached as Appendix B.

[3] The California Supreme Court having entered its order on December 14, 1994 [see Appendix B], this Petition is timely. Rule 13.1, Rules of the Supreme Court of the United States.

FEDERAL QUESTION TIMELY RAISED

City commenced this action by filing suit against Hamrol to collect a development fee. Hamrol raised his constitutional defense in his Answer (AA-4). A copy of the Answer is included as Appendix C. The trial court decided the constitutional issue against Hamrol on the merits. Hamrol raised his constitutional defense as a basis for appeal. Excerpts from his appeal briefs, letter brief to the Court of Appeal and Petition for Review to the California Supreme Court are all included as Appendix D.

STATEMENT OF THE CASE

A. Introduction.

In this action, City seeks to collect a transit impact development fee ("TIDF")[4] from Hamrol. City claims that Hamrol should have paid the fee when he obtained a building permit for construction of an office building (the "Building").

The TIDF is a regulatory fee — not a tax — intended to mitigate the burden on public transit caused by cumulative, new office development in the downtown San Francisco area.[5] City bases the fee upon a simple premise: The net

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[4]City levies the TIDF pursuant to the Transit Impact Development Fee Ordinance ("TIDFO") (Chapter 38 of the San Francisco Administrative Code). P. Ex. 3. The California Supreme Court described and quoted from the TIDFO extensively in *Russ Bldg. Partnership v. City & County of San Francisco*, 44 Cal. 3d 839, 244 Cal. Rptr. 682, 750 P. 2d 324 (1988) ("*Russ Bldg.*").

[5]The California Courts have distinguished regulatory fees from taxes (such as an excise on the right to conduct a certain business) in several opinions. *See, e.g., Centex Real Estate Corp. v. City of Vallejo*, 19 Cal. App. 4th 1358, 24 Cal. Rptr. 2d 48 (1993); *Trent Meredith, Inc. v. City of Oxnard*, 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981). Under California law, a valid regulatory fee or exaction must relate in some

addition of new office space attracts additional office workers to the downtown area, some of whom will ride public transit during peak commute hours. Thus, developers of net new office space should be required to pay a fee to acquire rolling stock and other capital assets needed to enhance the transit system.[6]

Hamrol built the Building to house City agencies moving from the San Francisco Hall of Justice (the "Hall") approximately one-half block away. *The move added no new workers to the area because the space vacated at the Hall could not lawfully be reoccupied.* The Fact Summary below more fully explains these circumstances.

B. Fact Summary.

Starting in the late 1970s, the San Francisco Public Defender ("Defender") began to seek alternatives for its cramped quarters at the Hall.[7] At that time, Hamrol was

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fashion to the impact caused by the project against which it is imposed. In some cases, the California Courts can be quite exacting in this analysis. *See, e.g., Bixel Assocs. v. City of Los Angeles*, 216 Cal. App. 3d 1208, 265 Cal. Rptr. 347 (1989). In other cases such as *Nollan*, the nexus the California courts accept is nothing more than pure "gimmickry." *Dolan*, at 2317.

[6] *See Russ Bldg.*, 44 Cal. 3d at 844-45, 244 Cal. Rptr. at 683-685, 750 P. 2d at 325-327.

[7] The overcrowded conditions of those quarters had reached grotesque proportions by the mid-'80s. RT 145:2-146:4. The Chief Assistant Public Defender, Peter Keane ("Keane") estimated that he was housing 110 people in approximately 5,500 square feet of space at the Hall — with 70 lawyers in a space originally designed to accommodate 18 lawyers. RT 145:2-15. Keane testified that the Defender could no longer function in its space at the Hall; and that the Defender had been repeatedly cited for code violations. RT 145:16-146:4; 146:8-27. The San Francisco Sheriff's Department ("Sheriff") and Office of Citizen's Complaint ("OCC"), agencies that also took space in the Building, were similarly overcrowded at the Hall. RT 148:20-149:9.

negotiating to acquire an option on vacant land close to the Hall. RT 249:16-249:27; 303:5-305:20.

An intermediary put Hamrol and the Defender together and they worked out a deal. Hamrol designed the Building to meet the specifications he was given by the Defender and by other City agencies also overcrowded at the Hall — and City agreed to lease the space in the Building. RT 148:2-17; 151:9-28. The Defender and other agencies moved from the Hall to the Building upon its completion.

Hamrol did not pay the TIDF when he took out his building permit for the Building. He did not believe that the TIDF applied. The City's lease negotiator, Gerald Romani ("Romani") shared that belief and said so to Hamrol. RT 190:24-191:17. Although neither Hamrol nor Romani are lawyers, they had a reasonable basis for their belief, a basis directly germane to the constitutional issues framed by this case.

Hamrol and Romani believed that the TIDF did not apply to the Building *because it added no new office workers.* Hamrol built the Building for the express and limited purpose of housing City agencies *moving from overcrowded space at the Hall that would not be reoccupied by others.*[8] Such reoccupancy would have violated building and safety code requirements.[9] *In short, the Building would not create*

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[8] At trial, the City Attorney argued that the space might some day be occupied — and that this hypothetical possibility was sufficient to establish that the Building added net new space. RT 171:5-171:15. On this record, there is no showing whatsoever that the illegal levels of occupancy at the Hall prior to the Defender's move could somehow have been legally restored. But if the space can be improved and brought up to a standard that would allow occupancy, it is the work of restoration that adds workers to the area and creates impact on transit, not the Building.

[9] See note 7, *supra.*

"additional" office space for lawful occupancy by City agencies and would therefore have no impact on transit.[10]

Despite these facts established in a bench trial, the trial court entered judgment for City and against Hamrol, holding him liable for the TIDF. The Court of Appeal affirmed and the California Supreme Court denied Hamrol's Petition For Review.

REASONS FOR GRANTING WRIT OF CERTIORARI

This Court should grant certiorari in this case under Rule 10.1(c) of the Rules of the Supreme Court because "[T]he state court . . . has decided a federal question in a way that conflicts with applicable decisions of this Court. Indeed, the state court simply ignored recent and important decisions of this Court on a point of constitutional law of great current interest. The point here in issue has prompted several decisions by this Court, many of them dealing with cases originating in the California state courts.[11]

A state court decision that ignores recent and important precedent from this Court has grave implications under the Supremacy Clause.[12] Moreover, it encourages continued

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[10]City reinforced Hamrol's conclusions about the TIDF when it addressed concerns over parking raised by neighbors of the Building. The neighbors argued that proposed use of the Building should be denied unless Hamrol agreed to meet stringent off-street parking requirements. RT 155:3-156:28. The Defender and other involved City officials opposed the parking requirement before City's own Board Of Permit Appeals by stating that the Building would not increase parking demand in the area. Why? *Because the Building would add no net new employment — and hence no new commuters — to the area.* That being the case, it would have no impact on transit either (RT 156:26-157:11.) (D. Exs. 1004, 1005, 1006).

[11]See cases cited at note 25, infra.

[12]See note 13, infra.

violations of constitutional rights that this Court has carefully delineated. At a minimum, the writ should be granted with a remand directing reconsideration, as in *Ehrlich v. City of Culver City*, 512 U.S. ____, 62 U.S.L.W. 3860 (June 28, 1994).

ARGUMENT

A. The Opinion Below: The Court Of Appeal Expressly Refused To Apply The Constitutional Precedents Of This Court.

The California Court of Appeal summarily rejected Hamrol's constitutional claims. Appendix A, pp.7-10. In doing so, it adopted concepts that directly conflict with this Court's decisions in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), *Nollan* and *Dolan*.

Although Hamrol raised federal claims, the Court of Appeal cited no federal authorities, stating that they were irrelevant.[13] It reached the puzzling conclusion that no federal authorities are relevant to a challenge to the constitutionality of an ordinance, as applied to the facts of a particular case — despite the fact that *Lucas*, *Nollan* and *Dolan* all dealt with exactly such challenges. Appendix A, p.8 n.4.[14] And it also concluded that the legislative "findings"

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[13] The Court of Appeal's disregard of this Court's recent holdings raises, we submit, a grave issue under the Supremacy Clause: "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, Sec. 2. As this Court stated in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958): "*Marbury v. Madison* . . . . declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. . . ."

[14] Having decided that federal precedent did not apply, the Court of Appeal disregarded this Court's grant of certiorari, vacating the decision

in the TIDFO foreclosed Hamrol's right to an individualized determination of "nexus" and "rough proportionality," despite this Court's holding to the contrary in Lucas.[15]

Having thus "disposed" of the constitutional issues, the Court of Appeal analyzed Hamrol's claims under California law — and placed upon him a burden of "proof" that for all practical purposes adds up to a conclusive presumption.

> Moreover, as noted by the trial court, appellant presented no evidence that the occupancy of the building would remain static (that is, occupied by either the public defender or others whose use of public transit is equal to that of those who initially occupied the building in 1987). *In sum, appellant did not establish that he would not benefit from the TIDF over the (presumed) 45-year life of the building and that, accordingly, it is unlawful to apply the TIDF to him.*

Appendix A, p. 9-10. Under *Dolan*, the City — not Hamrol — should bear the burden, as an essential element of constitutional right.

Hamrol submits that the Court of Appeal opinion conflicts with the recent and controlling precedents of this

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in *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 19 Cal. Rptr. 2d 468 (1993) and remanding "... for further consideration in light of *Dolan v. City of Tigard*, 512 U.S. _____, 62 LW 4576 (1994)." 62 U.S.L.W. 3860 (June 28, 1994). Hamrol's counsel had cited the order in *Ehrlich* as a clear signal of this Court's view that the Dolan "rough proportionality" test applied to regulatory fee cases as well as cases where an interest in land is exacted as a condition of project approval. See Appendix D.

[15]The Court of Appeals summarily rejected Hamrol's right to an individualized determination of impact, relying on *Russ Bldg.* That case upheld the constitutionality of the TIDFO in a class action. Hamrol was a member of the class. But *Russ Bldg.* is not res judicata as to Hamrol in this action because the Court in *Russ Bldg. expressly refused* to consider the constitutional issue Hamrol seeks to raise here. See pp. 15-18, *infra.*

Court from beginning to end. If allowed to stand, it will deprive Hamrol of his constitutional rights.

B. On the Record Below, City Failed To Establish The Essential Nexus Between The TIDF And The Building: The TIDF Cannot be Applied To Hamrol Without Violating His Fifth And Fourteenth Amendment Rights.

In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), this Court held that a condition imposed upon approval of a project violates the "just compensation" requirement of the Fifth Amendment of the United States Constitution unless it alleviates an impact caused by the project approved. In *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), this Court refined *Nollan* by holding that the regulatory exaction must be "roughly proportional" to the impact caused by the project approved — with the imposing authority to bear the burden of proof.[16]

Here, the California appellate court has refused to apply the rules articulated in Nollan and Dolan — without citation to either case — as if the writ of this Court does not run within the boundaries of the State of California.

The regulatory fee City seeks to collect from Hamrol is for a purpose wholly unrelated to any burden his project causes. *City has admitted as much.* The Court of Appeal opinion acknowledges — indeed embraces — the admission, *finding it irrelevant.* Appendix A pp. 7-10.

The "federal question" in this instance has justified two illuminating and important decisions of this Court over a

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[16] Because the dedication requirement in Nollan did not address any impact caused by the project, *Nollan* did not consider whether the Fifth and Fourteenth Amendments of the U.S. Constitution imposed a limitation upon the magnitude of an imposition that in fact addressed an impact caused by the burdened project. *Dolan* took up that question. *See Dolan*, 114 S. Ct. at 2317-18.

span of seven years. That effort goes for naught if state tribunals can ignore the product of it with impunity — as though the opinions didn't exist.

C. The Decision Of The Court Of Appeal Conflicts With The Holding Of The United States Supreme Court in *Dolan v. City of Tigard.* Under *Dolan*, City Cannot Constitutionally Collect The TIDF From Hamrol.

Hamrol contends that the Court of Appeal should have — but did not — apply the holding of *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) to the facts of this case. Had it done so, it would have been required to reverse the trial court judgment on three separate grounds that Dolan establishes.

1. *Dolan* Holds That An Exaction Imposed As A Condition Of A Development Permit Must Be Roughly Proportional To The Impact The Development Itself Will Cause, Determined On The Facts Of Each Case With The City Bearing The Burden Of Proof.

In *Nollan*, this Court did not determine the degree of nexus required, nor did it address the issue of how the local governing body must make the nexus determination. *Dolan* addressed those issues in the context of a case where the exactions clearly addressed project impacts, but the property owner contended that the exactions greatly exceeded the level necessary to alleviate the impacts the project itself would cause.

The Court stated: "No precise mathematical calculation is required, *but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.*" 114 S. Ct. at 2319-20. The Court held that the nature and extent of the required dedication must be "roughly proportional" to the impact of the proposed devel-

opment, *with the city to bear the burden of proof. Id.* at 2319, 2320 n.8.

Dolan establishes three principles that arise under the Fifth and Fourteenth Amendments of the U.S. Constitution — all part of the holding — that are dispositive here.

First, the exaction must be related *both in nature and extent to the impact of the proposed development.* City has admitted that no such relationship existed in this case when it imposed the exaction on the Building. The Building added no new transit riders. Thus, it had no impact to be mitigated by the TIDF.

Second, the issues of nature and extent — rough proportionality — must be determined on *an individualized basis.* A property owner challenging an exaction is entitled to have that determination made on the facts of his specific case and not on the basis of generalized legislative findings.[17] The Court of Appeal relied on the findings in the TIDFO to support its claim in this case.

Third, City bears the burden of proof in making the determination. City must prove the nature and extent of the impact and the rough proportionality of that impact to the exaction required. Here, City seeks to sustain the TIDF based on the *possibility* that the Building might have an impact at some point in its useful life. The trial court found — and the Court of Appeal agreed — that the TIDF nonetheless applied: Hamrol could not prove that sometime

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[17] Well before *Lucas*, this Court had repeatedly stated that takings cases must be decided on their particular facts. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492-93, 495 (1987); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986); *Agins v. City of Tiburon*, 447 U.S. 255, 269 (1980); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978).

within the next 45 years the impact addressed by the TIDFO might arise. Appendix A 9-10.[18]

Under *Dolan*, the boot is on the other foot. The City was required to prove that the impact *would occur*. It never attempted to do that.

If *Dolan* applies, then the Court of Appeal decision cannot stand and the trial court judgment must be reversed.

2. Dolan Applies To Fee Exaction Cases.

Before June, 1994, California courts held that the "essential nexus" requirement, as applied by the *Dolan* Court and originally enunciated in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), does not apply to fee exaction cases — those cases in which the government seeks to collect money as a condition of development approval rather than exact an interest in property.[19]

Shortly after filing its decision in *Dolan*, this Court granted certiorari in *Ehrlich v. City of Culver City*, 15 Cal.

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[18]The Court of Appeals' analysis is strikingly similar to the analysis rejected by this Court in *Dolan*:

> The city simply found that the creation of the pathway "could offset some of the traffic demand . . . and lessen the increase in traffic congestion."
>
> As Justice Peterson of the Supreme Court of Oregon explained in his dissenting opinion, however, '[t]he findings of fact that the bicycle pathway system "*could* [emphasis in original] offset some of the traffic demand" is a far cry from a finding that the bicycle pathway system *will* [emphasis in original] or is *likely to*, [emphasis in original] offset some of the traffic demand.' . . . No precise mathematical calculation is required, but the city must make some effort to quantify its findings . . . beyond the conclusory statement that it could offset some of the traffic demand generated.

114 S. Ct. at 2321-22.

[19]*Blue Jeans Equities West v. City & County of San Francisco*, 3 Cal. App. 4th 164, 4 Cal. Rptr. 2d 114, *cert. den'd*, 113 S. Ct. 191 (1992).

App. 4th 1737, 19 Cal. Rptr. 2d 468 (1993). The Court's order states: "The judgment is vacated and the case is remanded to the Court of Appeal of California, Second Appellate District, for further consideration in light of *Dolan v. City of Tigard*, 512 U.S. ____, 62 L.W. 4576 (1994)." 62 U.S.L.W. 3860 (June 28, 1994).

Ehrlich is a fee exaction case.[20] Hamrol argued below that this Court's grant of certiorari in *Ehrlich* should be taken as a directive to all Courts to consider *Dolan* when weighing constitutional issues raised in fee exaction cases. *The Court of Appeal did not even cite Dolan in this case.* Hamrol contends that *Dolan* applies. There is no basis in logic or equity for distinguishing between fees and other forms of exaction.

An "out-and-out plan of extortion . . ."[21] is not converted, willy-nilly, into something more benign merely because the character of the extorted property changes while the issues of essential nexus and rough proportionality do not.

D. Hamrol Raises Constitutional Issues That Have Not Been Adjudicated: The California Courts Have Refused To Address The *Nollan and Dolan* Issues.

Russ Bldg. upheld the validity of the TIDF. *Russ Bldg.* was initiated as a ". . . class action suit against the City to have the Ordinance [TIDFO] declared invalid on its face and as applied." 44 Cal. 3d at 845, 244 Cal. Rptr. at 684,

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[20] In *Ehrlich*, the City imposed a $280,000 fee as a condition of project approval to mitigate impacts caused by loss of recreational facilities and a $33,200 fee in lieu of a requirement that art be placed on the development project. 15 Cal. App. 4th at 1742-43, 19 Cal. Rptr. 2d at 471. The trial court invalidated the recreational impact fee, finding it in violation of the Fifth and Fourteenth Amendments. It refused to set aside the art fee, however. *Id.* at 1743-45. The Court of Appeal found both fees valid.

[21] *Nollan*, 483 U.S. at 837; *Dolan*, 114 S. Ct. at 2317.

750 P. 2d at 326. Hamrol was a member of the *Russ Bldg.* class. As a result, the trial court held that res judicata barred Hamrol's challenge to the TIDFO as applied to him.[22]

But in *Russ Bldg.*, the Court expressly refused to consider *Nollan*, carving the *Nollan* interpretation of constitutional principles out of the case.

> Plaintiffs . . . requested that we expand the issues . . . to consider whether the TIDF violates the takings clause of the United States Constitution, as interpreted in the United States Supreme Court's recent decision in *Nollan v. California Coastal Commission*. . . . (*Nollan* was decided after we granted review and before oral argument.) *We denied the request.*

44 Cal. 3d at 845 n.6, 244 Cal. Rptr. at 685 n.6, 750 P. 2d at 327 n.6.

Res judicata does not apply to issues expressly excluded from the prior determination interposed as a bar to the later action. "[W]hen it affirmatively appears that an issue was not determined by the judgment, it obviously is not res judicata upon that issue. A judgment is not an adjudication as to matters which the court expressly refrains from determining." *Stark v. Coker*, 20 Cal. 2d 839, 843, 129 P. 2d 390, 393 (1942).[23]

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[22]The Court of Appeal did not address the res judicata issue, although it treated all constitutional issues as having been foreclosed by *Russ Bldg.*

[23]See also, *Pacific Estates, Inc. v. Superior Court*, 13 Cal. App. 4th 1561, 17 Cal. Rptr. 2d 434 (1993); 7 Witkin, Cal. Procedure Judgments, Section 266 page 707 (3d ed. 1985). The same principle applies to collateral estoppel. *See American Int'l Underwriters Agency Corp. v. Superior Court*, 208 Cal. App. 3d 1357, 1362, 256 Cal. Rptr. 730, 733 (1989): "For the collateral estoppel doctrine to apply, there must be an affirmative answer to the following three questions: 'Was the issue

Russ Bldg. could not have decided the issues raised by Hamrol in this case because the Court expressly refused to decide them on the face of its opinion. Moreover, as the *Russ Bldg.* opinion discloses, it is not based on any individualized adjudication of nexus or rough proportionality on *any* state of facts. To the contrary, it is a case dependent from first to last upon a determination that legislative findings prevail regardless of the facts of any individual case.

With the California Supreme Court airily dismissing any obligation to consider a reasoned and directly relevant opinion of this Court in *Russ Bldg.*, it is less surprising that the Court of Appeal considered it appropriate to decide Hamrol's case without citing any of this Court's recent pronouncements that should have informed its deliberations. The pattern is all too typical of the approach property owners encounter in California.

We mean no disrespect to the California Judiciary — a judiciary that includes many hard working and competent judges. But we are not alone in commenting on the bias that appears to prevail in the California Courts when the rights of property owners are at stake.[24] Nor is the observation merely the whine of losing advocates.[25]

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decided in the prior adjudication identical with the one presented in the action in question? . . .' "

[24]There are notable exceptions to the trend, *see e.g., Healing v. California Coastal Comm'n,* 22 Cal. App. 4th 1158, 27 Cal. Rptr. 2d 758 (1994); *Surfside Colony, Ltd. v. California Coastal Comm'n,* 226 Cal. App. 3d 1260, 277 Cal.Rptr. 371 (1991); but they are truly exceptions.

[25]The overwhelming majority of the "takings" cases this Court has taken up have come from California. *See, e.g., Agins v. Tiburon,* 447 U.S. 255 (1980); *PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74 (1980); *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621 (1981); *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987); *Nollan, supra; Pennell v. City of San*

The California Courts' extreme tendencies have been remarked upon by many commentators, including those primarily with public sector credentials; for example: "The [California] courts have elevated governmental arrogance to a fine art." Richard Babcock and Charles Siemon, *The Zoning Game Revisited* 253 (1985). California is a place marked by "the inability of private landowners to obtain any sort of judicial relief." Callies, *"The Taking Issue Revisited"* 37 Land Use Law and Zoning Digest 6, 7 (July 1985).

Professor Norman Williams, known as sympathetic to public sector regulation in matters of land use has noted California as "striking" for upholding restrictions on property owners "which would not be upheld in many other states, and (in some instances) probably not in any other." 1 American Land Planning Law, Sec. 6.03 at 184 (Rev.Ed. 1988). Babcock and Siemon have called California a "bizarre jurisdiction" in which a property owner would have to be a "madman" to litigate. Babcock and Siemon, *supra* at 257. Instead, they concluded that, rather than wasting time litigating, it would cost a lot less and save much time "if [a developer] simply slit his throat." *Id.* at 293.[26]

Jose, 485 U.S. 1 (1988); *Yee v. City of Escondido,* 112 S. Ct. 1522 (1992); *Ehrlich, supra.* In the last 20 years, the total of such cases from California exceeds the total from all other jurisdictions combined.

[26]An exhaustive analysis of California Supreme Court opinions conducted by professors and students at UCLA law school reached a similar conclusion. *See* Joseph F. DiMento et al., *Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist —Erratic Eras,* 27 UCLA L. Rev. 859 (1980). In summarizing the California Supreme Court's decisions during one period of the study, the authors state: *"The most important finding of this study was that the California Supreme Court from 1967 through late 1977 was extremely preservationist — as distinguished from development-oriented. It is a finding so dominant that it overwhelms almost all other variables in this study — as if nothing else in a case mattered* [emphasis in original]." *Id.* at 868. As the study shows, the pattern did not significantly change in later periods.

We submit that the record in this case illustrates a disregard of this Court's recent constitutional precedent that simply cannot be allowed to stand on an important point of constitutional law.

CONCLUSION

This Court should grant Hamrol's petition and issue its Writ of Certiorari.

Dated: March 10, 1995

Respectfully submitted,

HOWARD N. ELLMAN
ELLMAN, BURKE, HOFFMAN & JOHNSON, A Professional Corporation

By: HOWARD N. ELLMAN
Counsel of Record

APPENDIX A

A064977

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

CITY AND COUNTY OF SAN FRANCISCO,
Plaintiff and Respondent,

v.

BURT HAMROL,
Defendant and Appellant.

FILED SEPTEMBER 29, 1994
Court of Appeal-First District
RON D. BARROW, CLERK

On September 17, 1990, the City and County of San Francisco (respondent) sued Burt Hamrol (appellant), the owner and developer of an office building (the building) at 555 Seventh Street in San Francisco (the subject property), to recover a Transit Impact Development Fee (TIDF) imposed by respondent under Chapter 38 of the San Francisco Administrative Code. Following a nonjury trial the trial court found against appellant and entered judgment in favor of respondent in the principal sum of $146,940.35, plus accrued interest of $60,079.76.

Appellant contends that the trial court erred in three principal respects. First, appellant contends that respondent

is estopped from collecting the TIDF from him because of certain opinions offered by one of respondent's employees, Gerald Romani, before appellant acquired the subject property and built the building. Second, appellant contends that application of the TIDF to him is unlawful. And third, appellant contends that respondent's claims are barred by the statute of limitations.

I. FACTUAL BACKGROUND

A. History of TIDF

Chapter 38 (the Ordinance) was added to the San Francisco Administrative Code in 1984. Under the Ordinance, respondent imposed a fee (TIDF) of $5 per gross square foot of office space on developers of new developments in the downtown area. In enacting the Ordinance, respondent made the following findings: "All office uses in the downtown area are benefited by virtue of the availability of the Municipal Railway as a means of transit for employees and customers. [¶] The demand for public transit service from downtown area office uses imposes a unique burden on the Municipal Railway, qualitatively different than the burden imposed by other uses of property in San Francisco. The need for that level of service provided by the Municipal Railway during peak-periods can be attributed in substantial part to office uses of property in the downtown area. [¶] New developments will bring increased need for public transit in the downtown area during peak-periods. . . . Future increases in demand for public transit service are therefore attributable directly to new development in the downtown area increasing the number of persons using the Municipal Railway during peak-periods. . . . [¶] . . . The cost of expanding current services and adding new services is directly proportional to the amount of peak-period Municipal Railway travel generated by new development. Development of office uses causes more additional Municipal Railway peak-

period person-trips, per square foot than the development of any other use of property in the downtown area. . . .

The Ordinance also reflects that the TIDF serves the following purposes: "It is the purpose of this ordinance to require developers of new development in the Downtown Area to pay a fee which is related directly to the incremental financial burden imposed upon the Municipal Railway . . . . [¶] The Transit impact Development Fee is the most practical and equitable method of financing the construction and operation of required public transit service additions and improvements for the Downtown Area . . . . [¶] . . . This fee is designed to reflect the benefits conferred on new development because of the added peak-period capacity to carry the passengers generated by office uses in the new developments . . . . "

The Ordinance was subjected to immediate attack by developers. In *Russ Bldg. Partnership* v. *City and County of San Francisco* (1987) 199 Cal.App.3d 1496 (*Russ Bldg. I*), reprinted as directed by the Supreme Court in *Russ Bldg. Partnership* v. *City and County of San Francisco* (1988) 44 Cal.3d 839, 854-855 (*Russ Bldg. II*), Division Five of this district upheld the constitutionality of the Ordinance. In *Russ Bldg. II*, the Supreme Court upheld the application of the Ordinance to two projects that had been approved prior to and were under construction at the time of the Ordinance's adoption.

B. Appellant's Project

Appellant acquired an option to purchase the subject property with the specific and sole intention of building an office to lease to respondent. Appellant knew that many of respondent's employees (Including, specifically, those in the public defender's office) were working in highly overcrowded conditions and that respondent needed office space for them.

Negotiations ensued between appellant and Romani, who then worked for respondent's Department of Real Estate, regarding the space and amenities required for respondent's employees and the rent to be charged by appellant. During the negotiations, two things were understood by both appellant and Romani: (1) the interior of the building was to be constructed to suit the needs of respondent; and (2) the rent would reflect appellant's total project costs and the marketplace. Appellant regularly presented anticipated project costs to Romani; as negotiations proceeded and total project costs were determined, appellant and Romani began to focus on a rental figure for the building.[1]

While negotiations were proceeding and before an agreement was reached between appellant and Romani, appellant asked Romani's opinion as to whether or not the TIDF would apply to his project. Romani reviewed the Ordinance and told appellant that he thought it did not apply because the (contemplated) building would not bring new workers to the area. (The workers who would occupy the new building were being relocated from the Hall of Justice "around the corner" from appellant's project.) As negotiations between appellant and Romani reached their conclusion, both knew that the project costs upon which the (agreed) rental rate was predicated did not include the TIDF.

The lease between appellant and respondent was approved by the Department of Real Estate and the Board of Supervisors and was signed on August 1, 1985. On March 14, 1986, appellant was informed for the first time that, in the view of respondent's Public Utilities Commission (PUC), the Ordinance did apply to the building, and the TIDF would be assessed. Appellant waived his right to appeal imposition of

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[1] Once appellant and Romani agreed upon a rental figure, that agreement had to be approved by respondent's Department of Real Estate and submitted to the Board of Supervisors for approval.

the TIDF the same day. In early September 1987, respondent determined that the building was more than 50 percent occupied, and a formal invoice was sent to appellant on September 15, 1987.

Shortly thereafter, appellant (acting through counsel) protested imposition of the fee. Lengthy negotiations followed which were ultimately unsuccessful, and the instant action ensued.

II. ANALYSIS

A. Respondent Is Not Estopped from Collecting the TIDF

As a general matter, four elements must be present to invoke the doctrine of equitable estoppel: " '. . . (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.' " (*City of Long Beach* v. *Mansell* (1970) 3 Cal.3d 462, 489.) A public entity may be bound by an equitable estoppel to the same extent as a private party, if the elements requisite to an estoppel against a private party are present, and "the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*Id.*, at pp. 496-497.)

Per appellant, the doctrine of estoppel should bar respondent from collecting the TIDF from him because (a) respondent's representatives knew that appellant believed that the TIDF did not apply and that he (appellant) had excluded it from the project costs used to calculate the rent charged under the lease; and (b) respondent's representatives encouraged him to believe that the TIDF did not

apply, thus allowing respondent to enjoy the benefit of a rental rate which was lower than it would have been if appellant had known that the TIDF would be assessed. Per appellant, if he had known that the TIDF would be assessed, he would have included it in project costs; if the rental rate required to amortize that additional cost had resulted in a rental rate which was too high for respondent, appellant would not have spent the money required to buy the subject property and build the building.

Under the undisputed facts established at trial, appellant cannot establish an estoppel. The only representative of respondent who indicated before the lease was signed that the TIDF did not apply was Romani. Romani was not charged with administration of the TIDF; that responsibility rested with the PUC. Moreover, Romani did not say: "The TIDF *will* not be applied to this project." What Romani did was *opine* that the TIDF might not or "probably [did not] apply."

An opinion about the applicability of a statute (a matter of law) cannot serve as the basis for estoppel in the absence of actual or professed special knowledge or a confidential relationship. (*Gilbert* v. *City of Martinez* (1957) 152 Cal.App.2d 374, 378.) Appellant did not assert below, nor does he assert on appeal, that any of those exceptions applies here.[2] Thus, appellant's estoppel claim must fail.[3]

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[2]We note that Romani was unfamiliar with the TIDF until *appellant* raised the subject with him.

[3]Appellant also argues that the same facts used to support his estoppel claim support a claim or defense of unjust enrichment. Per appellant, respondent should not be able to benefit from assessing the TIDF and enjoying a rent which does not reflect the TIDF as a cost. However, as pointed out by respondent, the trial court found that appellant had improperly waited until trial to raise the issue or defense of unjust enrichment and that respondent would have been prejudiced by appellant's raising it at that time. Appellant has not asserted that there was

B. The TIDF May Lawfully Be Applied to Appellant's Building

Appellant next asserts that the TIDF may not be lawfully applied to him because this building does not (currently) bring new municipal railway riders to the downtown area. Appellant asks us to analyze the TIDF, as applied to this project, using the approach adopted in *Bixel Associates* v. *City of Los Angeles* (1989) 216 Cal.App.3d 1208.[4]

In *Bixel* Division One of the Second District was confronted with numerous challenges to a fire hydrant fee assessed as a condition of the issuance of a building permit in the City of Los Angeles. The *Bixel* court found that the fee constituted an invalid special tax imposed without voter approval under California Constitution, article XIII A, section 4. (*Bixel, supra*, 216 Cal.App.3d at pp. 1218-1220.) Because the court found the fee invalid, it did not address the contention that the fee violated the due process guarantees of the federal and state Constitutions. (*Ibid.*)

The *Bixel* court noted that, in order for a development to pass muster under California Constitution, article XIII A, section 4, "*it must not exceed the reasonable cost of providing the service for which the fee is charged, and the basis for determining the amount of the fee allocated to the developer must bear a fair and reasonable relation to the developer's*

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any error in those findings. Thus, we need not address appellant's conceptual argument relating to unjust enrichment.

[4]Appellant cites several federal authorities in his opening brief and in his letter brief of August 12, 1994. However, he cites those authorities in support of the proposition that he is entitled to challenge the TIDF, as applied to him, in spite of the ruling in *Russ Bldg. I.* He does not cite those authorities in support of a federal "takings" claim. Because we have elected to consider appellant's challenge to the Ordinance, as applied, we do not address the federal authorities relied upon by either party.

benefit from the fee." (*Bixel, supra*, 216 Cal.App.3d at p. 1218; emphasis in original.)

In *Russ Bldg. I*, the Court of Appeal determined that the TIDF was not invalid under California Constitution, article XIII A, section 4. (*Russ Bldg. I, supra*, 199 Cal.App.3d at pp. 1504-1507.) Appellant appears to claim that the blanket determination in *Russ Bldg. I* does not foreclose his challenge to the TIDF, as applied to him, because (as a provider of office space which brings no new workers to the downtown area) he derives no benefit from the fee.

Appellant's conceptual argument ignores several aspects of the TIDF and the trial court's findings pertaining to its application to him. First, the amount of the TIDF reflects anticipated increased transit costs generated over a 45-year life of each building; and the Ordinance provides for a uniform distribution of costs over all new office space without adjusting for either the actual life of any individual building or the actual incremental transit burden occasioned by an individual building. (*Russ Bldg. I, supra*, Cal.App.3d at p. 1503.)

Thus, appellant stands in no different shoes from any other developer of new office space whose building has, for example, an unusually short useful life or whose building is occupied by persons who (a) are not users of public transit or (b) are relocating from other downtown office space. Moreover, as noted by the trial court, appellant presented no evidence that the occupancy of the building would remain static (that is, occupied by either the public defender or others whose use of public transit is equal to that of those who initially occupied the building in 1987.) In sum, appellant did not establish that he would not benefit from the TIDF over the (presumed) 45-year life of the building and that, accordingly, it is unlawful to apply the TIDF to him.

C. Respondent's Claim In Not Barred by the Statute of Limitations

Code of Civil Procedure section 338, subdivision (a), provides that an action founded upon a liability created by statute (as is the one at hand) must be brought within three years. Section 38.4 of the Ordinance provides that the TIDF is "payable" at the earliest of three dates: (1) the date when 50 percent of the net rentable area of the project has been occupied; (2) the date of issuance of the first temporary permit of occupancy, or (3) the date of issuance of a final certificate of occupancy.

Per appellant, since city agencies occupied at least some of the building as early as February 1987, the TIDF became "payable" at that time, and a filing on September 17, 1990, was more than six months too late. Appellant seems to argue, as a fallback position, that either September 4 (when city inspectors first determined that the building was more than 50 percent occupied) or September 15, 1987 (the date on which the first invoice was sent), constitutes the date on which the TIDF became payable; thus, initiation of the action on September 17, 1990, was somewhere between 2 and 13 days too late.

The problem with appellant's argument is that the statute of limitations begins to run under Code of Civil Procedure section 338 when the liability becomes *delinquent.* (*City of Los Angeles* v. *A.E.C. Los Angeles* (1973) 33 Cal.App.3d 933, 941.) Section 38.10, subdivision B, of the Ordinance provides that payment of the TIDF (where payment is not to be made in installments) is delinquent if it is not paid within 30 days of a request for payment. Here, the first request for payment was made on September 15, 1987; the payment was not delinquent until October 15, 1987. Thus, respondent's filing on September 17, 1990 was timely.

The judgment is affirmed. Each party is to bear his own costs of appeal.

Anderson, P.J.

We concur:

Perley, J.

Reardon, J.

APPENDIX B

No. A064977 S043100

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

IN BANK

First Appellate District, Division Four,

CITY AND COUNTY OF SAN FRANCISCO,
Respondent

v.

BURT HAMROL,
Appellant

SUPREME COURT FILED
DECEMBER 14, 1994
Robert Wandruff Clerk

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX C

No. 923 903

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Attorneys for Defendant
Burt Hamrol

ENDORSED FILED MARCH 27, 1992
Sann Francisco County Superior Court
DXXXXX DICKINSON, Clerk
MICHAEL K. TAMONY, Deputy Clerk

IN THE SUPERIOR COURT
OF THE
STATE OF CALIFORNIA IN AND FOR THE
CITY AND COUNTY OF
SAN FRANCISCO

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,
Plaintiff,

VS.

BURT HAMROL, and DOES 1-50,
Defendants.

VERIFIED ANSWER OF HAMROL TO FIRST AMENDED COMPLAINT

Defendant BURT HAMROL ("Hamrol") answers the unverified First Amended Complaint herein as follows:

1. Admits the allegations of paragraphs 1, 2, 6, 8, 9, 10, 11, 12, and 14.

2. Lacks information sufficient to form a belief as to the truth of the allegations of paragraphs 3 and 4, and, on that ground, denies each of those allegations.

3. Admits the first sentence of paragraph 5, and that the TIDF Ordinance's requirements are those stated in the Ordinance itself. Except as herein expressly admitted, Hamrol denies any remaining allegations in paragraph 5.

4. Answering paragraph 7, admits that the subject property is within the geographic "downtown area" defined in the TIDF Ordinance, and that the provisions of the Ordinance are those stated in the Ordinance. Except as herein expressly admitted, Hamrol denies the remaining allegations of paragraph 7.

5. Answering paragraph 13, Hamrol admits the first and second sentences thereof, and admits and alleges that he made no agreement to pay all or any part of the claimed TIDF fee on any basis. Except as herein expressly admitted, Hamrol denies the remaining allegations of paragraph 13.

6. Answering paragraph 15, Hamrol admits that he has not paid any part of the alleged TIDF fee, and that the provisions of the Ordinance are those stated in the Ordinance. Except as herein expressly admitted, Hamrol denies the remaining allegations of paragraph 15 and denies that he owes any TIDF fee on the subject property, or any interest on such a fee.

7. Answering paragraph 16, Hamrol adopts by this reference his answers, above, to the allegations incorporated by reference in paragraph 16.

8. Answering paragraph 17, Hamrol denies the allegations thereof, each and every, all and singular, and denies that he owes any part of the sums alleged.

9. Answering paragraph 18, Hamrol admits that City has demanded payment of a TIDF fee, and that he has paid no part of that fee. Hamrol denies the remaining allegations of paragraph 18, and denies that he owes any part of the sums alleged.

AFFIRMATIVE DEFENSES

Hamrol alleges the following affirmative defenses to the First Amended Complaint and to each purported cause of action therein:

1. Plaintiff's claims are barred by Code of Civil Procedure Sections 337(2), 338(a), 339(1), 340(1) and 340(2).

2. Plaintiff has waived the claims it has alleged. Plaintiff induced Hamrol to act on the representation that the disputed building would relieve overcrowding of existing City workers, and would generate no net increase of workers in the area. Hamrol acted on that understanding.

3. Plaintiff is estopped to assert the claims it has alleged.

4. Plaintiff is barred by the doctrine of laches from the claims it has alleged. Plaintiff failed to assert its rights promptly.

5. Application of the Transit Impact Development Fee ("TIDF") to Hamrol's property violates the Fifth Amendment to the Constitution of the United States.

WHEREFORE, Hamrol prays for judgment that Plaintiff take nothing, and for his costs of suit and attorneys' fees.

Dated: March 19, 1992

ELLMAN, BURKE, HOFFMAN & JOHNSON, a Professional Corporation

By HOWARD N. ELLMAN
Howard N. Ellman
Attorneys for Defendant
Burt Hamrol

VERIFICATION

I, Burt J. Hamrol, declare:

I am a defendant in this action. I have read the foregoing Verified Answer of Hamrol to First Amended Complaint and the statements made therein are true, except as to any made on information and belief, and as to those I believe them to be true.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

Dated: March 19, 1992

BURT J. HAMROL

Burt J. Hamrol

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

I am over 18 years of age, and employed in the City and County of San Francisco, State of California. I am not a party to the within action. My business address is one Ecker Building, Suite 200, San Francisco, California 94105. I placed a true copy of the following document:

VERIFIED ANSWER OF HAMROL TO FIRST AMENDED COMPLAINT

in an envelope addressed as follows:

Robin Reitzes, Esq.
Suzanne A. Tollefson, Esq.
Deputy City Attorneys
City Hall, Room 206
San Francisco, CA 94102

which envelope I then sealed and placed for collection and mailing on the date below written following ordinary business practices. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and know that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this Declaration is executed on the date below written.

Dated: 3/27/92 SANDRA L. FAWCETT

APPENDIX D

Excerpts From Hamrol's Brief
In California Court of Appeal.

1 CIV. A064977

IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,
Plaintiff and Appellee,
VS.
BURT HAMROL,
Defendant and Appellant.

FILED MAY 10, 1994
Court of Appeal First District
Ron D. Barrow, Clerk

APPELLANT'S BRIEF

On Appeal From the Superior Court of California
City and County of San Francisco
The Honorable Thomas J. Dandurand, Judge

HOWARD J. ELLMAN (S.B. NO. 29820)
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May 10, 1994

1 Witkin, *Summary of California Law*, 820 (9th ed. 1987).

An account stated must be based upon *an agreement as to a balance owed.* As Witkin elaborates: "The parties must have had at least one previous transaction; *the statement cannot create a liability where none existed before.*" (Citations) *Ibid.*[18]

The TIDF is a one-time claim, not based upon a previous transaction or prior liability. It is not an account stated and is not subject to CCP Section 337(2).

This case is controlled by CCP Section 338. City filed late. It's claim should be dismissed.

D. The TIDF Cannot Lawfully Be Applied To The Building For Lack Of The Required Nexus.

A development fee is defective as a "special tax," or an exaction exceeding the police power,[19] unless it meets the "nexus" test. The test was recently defined in *Bixel Associ-*

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[18] "To constitute an account stated, it must appear that at the time . . . an indebtedness from one party to the other existed, that a balance was struck and agreed to be the correct sum owing . . . *and that the debtor . . . promised to pay the creditor the amount thus determined . . .*" *H. Russell Taylor Fire Prevention v. Coca Cola Bottling Corp.*, 99 Cal.App.3d 711, 726 (1979).

[19] Development fees are an exercise of the local police power granted to cities and counties by article XI, section 7 of the California Constitution. (Citations). While general law cities and counties receive their taxing power from the Legislature under article XIII, section 24, they can impose development fees pursuant to their police power without the necessity of authority from the Legislature.
California Building Industry Association v. New Hall School District, 206 Cal.App.3d 212, 234 (1988).

ates v. City of Los Angeles, 216 Cal.App.3d 1208, 1218 (1989), among other cases.

> [F]or a development fee such as city's fire hydrant fee to avoid invalidation as a special tax imposed without voter approval, *it must not exceed the reasonable cost of providing the service for which the fee is charged, and the basis for determining the amount of the fee allocated to the developer must bear a fair and reasonable relation to the developer's benefit from the fee.* (Emphasis in original).[20]

To the same effect, see, *e.g., Balch Enterprises v. New Haven Unified School District,* 219 Cal.App.3d 783 (1990); *California Building Industry Association v. New Hall School District,* 206 Cal.App.3d 212, 235 (1988); *Trent Merideth, Inc. v. Oxnard,* 114 Cal.App.3d 317 (1981).

The nexus test has a constitutional basis. The Fifth Amendment of the United States Constitution guarantees a property owner the right to be free from excessively burdensome exactions — those exactions that transcend the nexus between the developer's proposed action and the impacts sought to be alleviated. *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987). And as the Supreme Court

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[20]*Sea & Sage Audubon Society, Inc. v. Planning Commission,* 34 Cal.3d 412 (1983); *Russ Building Partnership v. City and County of San Francisco,* 199 Cal.App.3d 1496 (1987); *J. W. Jones Companies v. City of San Diego,* 157 Cal.App.3d 745 (1984); and *Beaumont Investors v. Beaumont-Cherry Water District,* 165 Cal.App.3d 227 (1983), are cited by the Court as authority for the foregoing proposition. Because the issue of nexus raises questions that arise under the Fifth and Fourteenth Amendments of the United States, a party may challenge the constitutionality of a development fee ordinance both on its face and as applied to the particular property owner on the facts relevant to that owner.

has repeatedly stated, the resolution of Fifth Amendment takings claims is uniquely a factual inquiry.[21]

A regulation may advance a legitimate state interest and still be invalid as applied to the facts of a specific case. Thus, the fact that the TIDF may have a valid purpose — funding for enhanced public transit — does not end the inquiry. It answers only the first portion of the threshold question, nothing more. Once the government establishes the facial legitimacy of its action, the focus shifts to the opposite pan of the balance, i.e., the impact of the regulation on a particular property owner based on the facts of that specific case.

On the facts of this case, City cannot claim that a nexus exists between construction of the Building and an impact on transit. The facts simply don't fit the template for exaction, as spelled out on the face of the TIDFO. For example, Section 38.3 of the TIDFO states:

> It is the purpose of this ordinance to require developers of new development in the Downtown Area to pay a fee which is related directly to *the incremental financial burden* imposed upon the municipal railway both for initial capital outlay for the acquisition of rolling stock and the construction of facilities and for the long-term operation, maintenance and replacement of those facilities once they are in place.

Section 38.2, finds: "New developments will bring increased need for public transit service in the Downtown Area during peak-periods."

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[21] See, *e.g.*, *Keystone Bituminus Coal Association v. DeBenedictis*, 480 U.S. 470, 492-93, 495 (1987); *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 224 (1986); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 138 (1978).

When it applied for its parking variance for the Building, City stated facts *directly contrary to both the findings and purpose of the TIDFO*. Keane and Romani both assured the Board of Permit Appeals that the Building would create no net increase in office workers. D. Exs 1004, 1005, 1006; RT 190:24-191:17; 159:16-160:8. If the Building would not accommodate new office workers, it would have no impact on Muni because it would create no demand for new riders. The City successfully obtained its parking variance on the basis of these arguments.[22]

Relying upon *Russ Building Partnership v. City and County of San Francisco*, 199 Cal.App.3d 1496 (1987), City contended below that Hamrol is barred by res judicata from raising constitutional claims against the TIDF. Hamrol was a member of the plaintiff class in that case.

Russ Building I challenged the *facial constitutionality* of the TIDFO. As a class action, it could not have challenged the constitutionality of the ordinance *as applied* to the specific and unique circumstances of each class member.

In a facial attack, the Court considers "whether the mere enactment of the . . . ordinance constitutes a taking." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). See also, *Hodel v. Virginia Surface Mining Ass'n*, 452 U.S. 264, 295 (1981); *Pennell v. San Jose*, 485 U.S. 1, 10 (1988). A facial challenges succeeds only if the ordinance is so defective that it could not be applied constitutionally to any state of facts.

City argued below that the findings in the TIDFO foreclose all factual inquiry. Thus, although the United States Supreme Court has declared that these cases should be

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[22] As their name implies, variances are legal acts that allow departure from otherwise applicable rules. They are official acts and constitute the law of the City with respect to the matters they cover. See *Terminal Plaza Corp v. City and County of San Francisco*, 186 Cal.App.3d 814, 825 n.6 (1986).

determined on the basis of their specific factual setting[23] in each case, City claims the right to foreclose those issues and render them non-justiciable through legislative findings by its Board of Supervisors.[24] City compounds this hubris by relying upon findings that plainly conflict with the uncontroverted evidence at trial.

The Board of Supervisors cannot make binding, across-the-board decisions foreclosing fundamental rights that must be settled on specific, adjudicated facts.[25] There is no nexus on the facts of this case. *Russ Building I* does not address or decide that issue.

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[23] See cases cited as note 21 *supra*.

[24] The United States Supreme Court rejected that very argument in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2899 (1992).

[25] *Ibid.* The U.S. Supreme Court settled the fundamental separation of powers issue now raised by City in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *Lucas, supra*, decides the specific issue adversely to City.

CONCLUSION

The Judgment should be reversed.

Dated: May 10, 1994.

Respectfully submitted,

HOWARD H. ELLMAN
KENNETH N. BURNS
ELLMAN, BURKE, HOFFMAN &
JOHNSON, a Professional
Corporation

By HOWARD N. ELLMAN
Howard N. Ellman
Attorneys for Defendant/
Appellant Burt Hamrol

APPENDIX E

Hamrol's Letter Brief To Court Of Appeal
Advising It Of Decision In *Dolan v. City of Tigard*
And Order in *Ehrlich v. Culver City.*

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August 12, 1994

FILED AUGUST 12, 1994 Court of Appeal — First App. Dist.
RON D. BARROW, Clerk

The Honorable Carl West Anderson, Presiding Justice
James F. Perley, Associate Justice and
Timothy A. Reardon, Associate Justice
Court of Appeal
First Appellate District, Division Four
Marathon Plaza, South Tower
303 Second Street, Suite 600
San Francisco, California 94107

Re: *City and County of San Francisco v. Burt Hamrol*
1 Civ. No. AO64977

Dear Presiding Justice Anderson and
Associate Justices Perley and Reardon:

We represent the Appellant ("Hamrol") in the captioned matter.

The City and County of San Francisco ("City") contends that Hamrol's constitutional arguments in the case are

foreclosed by City's legislative findings in the Transit Impact Development Fee Ordinance. We cited *Lucas v. South Carolina Coastal Council,* 112 S.Ct. 2886 (1992); *Healing v. Coastal Commission,* 22 Cal.App.4th 1158 (1994) and *Kavanau v. Santa Monica Rent Control Board,* 19 Cal.App.4th 730 (1993) to the contrary. Two recent actions by the United States Supreme Court and one by the California Supreme Court are directly relevant to the argument.

In *Dolan v. City of Tigard,* 62 U.S. Law Week 4576 (June 24, 1994), the United States Supreme Court held that a determination as to whether or not a regulation deprives a property owner of rights guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution can only be made after a trial of the specific facts. Slip.Op. 16. In *Hensler v. City of Glendale,* 94 DAR 10398 (July 25, 1994), the California Supreme Court reached the same conclusion, citing *Healing* with approval. 94 DAR *supra.* at 10401.

Ehrlich v. Culver City, 15 Cal.App.4th 1737 (1993) is a case in which the property owner challenged fees levied by the City of Culver City as a condition to development (as opposed to the execution of easements as was the case in *Dolan*). A petition for writ of certiorari in *Ehrlich* was pending before the United States Supreme Court when the Court filed its opinion in *Dolan.* Three days later, the Court made the following order in *Ehrlich*:

> "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeal of California, Second Appellate District, for further consideration in light of *Dolan v. City of Tigard,* 512 U.S. ____, 62 L.W. 4576 (1994)." 62 L.W. 3860 (June 28, 1994).

Hamrol submits that the Court's action with respect to *Ehrlich* demonstrates its view that the principles enunciated in *Dolan* apply to a fee exaction case such as this one. The Court's action in *Ehrlich* cannot be explained in any other way.

We ask that the Court take into consideration these recent decisions by the highest Courts of California and the United States if it believes that a resolution of the constitutional issue pending in this matter is necessary to reach a decision.

Respectfully submitted,

HOWARD N. ELLMAN
ELLMAN, BURKE, HOFFMAN & JOHNSON, A Professional Corporation

By: HOWARD N. ELLMAN
Howard N. Ellman
Attorneys for Appellant
Burt Hamrol

HNE/slf

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

I am over 18 years of age, and employed in the City and County of San Francisco, State of California. I am not a party to the within action. My business address is One Ecker Building, Suite 200, San Francisco, California 94105. I placed a true copy of the following document:

LETTER TO COURT OF APPEAL

in an envelope addressed as follows:

Robin M. Reitzes, Esq.
Deputy City Attorney
City Hall, Room 206
San Francisco, California 94102

which envelope I sealed with postage fully prepaid and placed for collection and mailing on this date, August 12, 1994, following ordinary business practices. I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service and know that the correspondence will be deposited with the United States Postal Service in San Francisco, California this same day in the ordinary course of business.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on the date below written.

Dated: August 12, 1994

SANDRA L. FAWCETT
Sandra L. Fawcett

APPENDIX F

Excerpts From Hamrol's Petition For
Review To The California Supreme Court

1 Civ. No. A064977

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation,
Plaintiff and Respondent,
vs.
BURT HAMROL,
Defendant and Appellant.

SUPREME COURT FILED NOVEMBER 4, 1994
Robert Wandruff, Clerk

PETITION FOR REVIEW

On Appeal From the Supreme Court of California
City and County of San Francisco,
The Honorable Thomas J. Dandurand, Judge

HOWARD N. ELLMAN (S.B. No. 29820)
KENNETH N. BURNS (S.B. No. 65354)
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Burt Hamrol

November 4, 1994

ARGUMENT

A. The Fifth And Fourteenth Amendment Issue: The Decision Of The Court Of Appeal Conflicts With The Holding Of The United States Supreme Court In *Dolan v. City Of Tigard*. Under *Dolan*, City Cannot Constitutionally Collect The TIDF From Hamrol.

Hamrol contends that the Court of Appeal should have — but did not — apply the holding of *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994) to the facts of this case. Had it done so, it would have been required to reverse the trial court judgment on three separate grounds that *Dolan* establishes.

1. *Dolan* Holds That An Exaction Imposed As A Condition Of A Development Permit Must Be Roughly Proportional To The Impact The Development Itself Will Cause, Determined On The Facts Of Each Case With The City Bearing The Burden of Proof.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the United States Supreme Court held that a local governing body could not impose an exaction, as a condition to issuance of a development permit, unless the exaction alleviated an impact the project caused — there must be an essential nexus between impacts of the development and the exaction required.

Because the Court found no nexus at all in *Nollan*, it did not reach the question of the degree of nexus required, nor did it address the issue of how the local governing body must make the nexus determination. *Dolan* addressed these issues in the context of a case where the exactions clearly addressed project impacts, but the property owner contended that the exactions greatly exceeded the level necessary to alleviate the impacts the project itself would cause.

The Court stated: "No precise mathematical calculation is required, *but the city must make some sort of individualized determination that the required dedication is related*

both in nature and extent to the impact of the proposed development." 114 S.Ct. at 2319-20. The Court held that the nature and extent of the required dedication must be "roughly proportional" to the impact of the proposed development, *with the city to bear the burden of proof. Id.* at 2319, 2320, n.8.

Dolan establishes three principles that arise under the Fifth and Fourteenth Amendments of the U.S. Constitution — all part of the holding — that are dispositive here.

First, the exaction must be related both in nature and extent to the impact of the proposed development. City has admitted that no such relationship existed in this case when it imposed the exaction of the Building. The Building added no new Muni riders. Thus, it had no impact to be mitigated by the TIDF.

Second, the issues of nature and extent — rough proportionality — must be determined on an individualized basis. A property owner challenging an exaction is entitled to have that determination made on the facts of his specific case and not on the basis of generalized legislative findings. City relies entirely on the findings in the TIDFO to support its claim in this case.

Third, City bears the burden of proof in making the determination. City must prove the nature and extent of the impact and the rough proportionality of that impact to the exaction required. Here, City seeks to sustain the TIDF based on the *possibility* that the Building might have an impact at same point in its useful life. The trial court found — and the Court of Appeal agreed — that the TIDF nonetheless applied: Hamrol count not prove that sometime

within the next 45 years the impact addressed by the TIDFO might arise. Slip Op. 9-10.[10]

Under *Dolan*, the boot is on the other foot. The City was required to prove that the impact *would occur*. It never attempted to do that.

If *Dolan* applies, then the Court of Appeal decision cannot stand and the trial court judgment must be reversed.

2. *Dolan* Applies To Fee Exaction Cases.

Before June, 1994, California courts held that the "essential nexus" requirement, as applied by the *Dolan* Court and originally enunciated in *Nollan v. California Coastal Commission*, *supra*, does not apply to fee exaction cases — those cases in which the government seeks to collect money as a

---

[10]The Court of Appeals' analysis is strikingly similar to the analysis rejected by the U.S. Supreme Court in *Dolan*.

> "But on the record before us, the City has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway 'could offset some of the traffic congestion.'
>
> As Justice Peterson of the Supreme Court of Oregon explained in his dissenting opinion, however, '[T]he findings of fact that the bicycle pathway system "*could* [emphasis in original] offset some of the traffic demand" is a far cry from a finding that the bicycle pathway system *will* [emphasis in original] or is *likely to* [emphasis in original] offset some of the traffic demand.' . . . No precise mathematical calculation is required, but the city must make some effort to quantify its findings . . . beyond the conclusory statement that it could offset some of the traffic demand generated."

114 S.Ct. 2321-22.

condition of development approval rather than exact an interest in property.[11]

Shortly after filing its decision in *Dolan*, the U.S. Supreme Court granted certiorari in *Ehrlich v. City of Culver City*, 15 Cal.App.4th 1737 (1993). The Court's order states: "The judgment is vacated and the case is remanded to the Court of Appeal of California, Second Appellate District, for further consideration in light of *Dolan v. City of Tigard*, 512 U.S. ____, 62 L.W. 4576 (1994)." 62 U.S.L.W. 3860 (June 28, 1994).

Ehrlich is a fee exaction case.[12] The case was

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[11] *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal.App.4th 164, *cert. den'd*, 113 S.Ct. 191 (1992).

[12] In *Ehrlich*, the City imposed a $280,000 fee as a condition of a project approval to mitigate impacts caused by loss of recreational facilities and a $33,200 fee in lieu